United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1902

To be argued by
JOSEPH ARTHUR COHEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARIA IANUZZI,
Plaintiff-Appellant,

—against—

SOUTH AFRICAN MARINE CORP.,
Defendant and Third Party Plaintiff-Appellee-Cross-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third Party Defendant-Cross-Appellee.

BRIEF FOR THIRD PARTY DEFENDANT-CROSS-APPELLEE

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party Defendant-Cross-Appellee
801 Second Avenue
New York, New York 10017
(212) 889-0410

SIDNEY A. SCHWARTZ,
JOSEPH ARTHUR COHEN,
Of Counsel.

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After a jury verdict was received in favor of the defendant (hereinafter Shipowner) and against the plaintiff, it was the suggestion of Shipowner's attorney that the issues involved in the Shipowner's third party action against the third party defendant (hereinafter I.T.O.) be determined by the Court without a jury (1135a).* We acceded to that suggestion (1137a); and the Court accepted that responsibility (1138a-1139a).

The Court thereafter rendered its "memorandum and order" (1144a) determining the fact issues reserved to it. On the basis of its findings of fact, the Court dismissed the Shipowner's indemnity action against I.T.O.

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* Unless otherwise indicated, all references are to pages of the Joint Appendix.

One might ask what there was to be determined in that action by the Shipowner against I.T.O. in view of the fact that the Shipowner had already obtained a verdict in its favor on the plaintiff's action. The answer is that the Shipowner was pressing its claim for counsel fees and other expenses of defense against I.T.O. on the grounds that the plaintiff's accident was in some way caused by a breach of I.T.O.'s implied warranty of workmanlike service. Whether or not there was any such breach that caused plaintiff's accident was the issue left for determination by the Trial Judge.

It is the position of I.T.O., the third party defendant Stevedore, that regardless of what disposition this Court may make on the plaintiff's appeal from the judgment entered against her and in favor of the Shipowner, there should nonetheless be an affirmance of the judgment dismissing the Shipowner's indemnity action against I.T.O. It is to that point only that this brief is addressed.

The Court's Findings of Fact

Insofar as the how and why of this accident is concerned, the Trial Judge made the following finding of fact (1145a):

> "Having carefully considered the trial record, I find by a clear preponderance of the evidence that the *sole* cause of Ianuzzi's death was a piece of lumber dropped upon him by one *Andre*, a carpenter employed by New Jersey Export Marine Carpenters." (Italics added).

As the *sole* cause of the decdent's death was the act of a person in the employ of a corporation not a party to this action (although plaintiff has since commenced an action against that corporation), the Trial Judge found no basis

for the Shipowner's claim against I.T.O. and dismissed the same. The Shipowner has thus had its day in Court insofar as it contends that the accident was caused by fault on the part of I.T.O. entitling it to indemnity from I.T.O.; and the only question that is really presented by the Shipowner's cross appeal is whether or not the Trial Judge's findings of fact are supported by evidence or are "clearly erroneous." For, if those factual findings are supported by evidence, then they are not "clearly erroneous" and may not be set aside, Rule 52(a) of the *Federal Rules of Civil Procedure.*

The Findings of the Court Below are Amply Supported by the Evidence

It was the plaintiff's contention that the decedent was standing on the main deck of the vessel's #3 hatch when an alleged malfunctioning winch caused him to be struck by an automobile being loaded into the hatch, which in turn caused him to fall through the open hatch down to the level below and sustain fatal injury. The Shipowner contended that there was nothing wrong with the winch. It was the contention of the third party defendant I.T.O. that the accident occurred in an altogether different fashion, as follows:

(1) That at the time of the accident the decedent was on the vessel's tween deck level, and not the main deck as plaintiff claimed.

(2) That the decedent was struck on the head and killed by a piece of lumber accidently dropped on his head by a person standing on the main deck level.

(3) That the person who dropped that lumber on the decedent's head was named Andre and he was a

carpenter in the employ of New Jersey Export Marine Carpenters.

(4) That the autopsy results were fully compatible with the decedent having been killed by a piece of lumber dropped upon his head from above.

(5) That the autopsy results were incompatible with the manner in which plaintiff claimed the accident happened.

In support of its position, the third party defendant called two witnesses to testify upon the trial of this action. The first of those witnesses was Joseph Andre (847a) who testified that he was a marine carpenter in the employ of New Jersey Export Marine Carpenters. Andre testified that there were other carpenters in the employ of New Jersey Export Marine Carpenters who were working down in the #3 hatch of the vessel engaged in chocking cars, and that it was his function to supply those carpenters working down in the hatch with wood that was located on the main deck of the vessel (853a). Andre admitted that he was picking the lumber up from the main deck of the vessel and *dropping* it down to the carpenters working inside the hatch (855a). He had been dropping lumber down into the hatch for approximately 10 minutes before the accident happened (855a-856a). He would drop 2, 3 or 4 pieces of lumber down at one time (857a). Andre admitted that one of the pieces of wood that he had dropped struck the decedent (864a) and he had so advised the police officer investigating the accident shortly after its occurrence. In addition, Andre admitted that he had further reported to ship's personnel that a piece of lumber dropped by him struck the decedent (866a-867a).

Andre further testified that he went to the hospital to which the decedent had been taken because (868a):

"* * * and I had felt that I was responsible for this and I felt that if I could tell the doctors what had happened to the man, that if they knew that it was dunnage that hit the man and he needed an operation and this would have been helpful for them if he needed an operation to tell them exactly what it was that hit him in the head * * *."

The second witness whom we called to testify upon the trial of this action was Dr. Dominic DiMaio who was the Acting Chief Medical Examiner for the City of New York (902a). Dr. DiMaio had performed the autopsy on the decedent at the Kings County Morgue (904a).

The only sign of injury found on autopsy were fractures of the very top or vertex of the decedent's head (904a-906a). There was no evidence of a fracture on the back of the head (906a). Other than the fracture on the very top of the decedent's head, the autopsy disclosed that there was no other injury to any part of the decedent's body (907a). One of the functions of the Medical Examiner's Office is to ascertain whether its physical findings on autopsy are compatible with the history of the death or injury that has been given to it (909a). In this case, the Medical Examiner's Office had been informed by the Long Island College Hospital that the accident to decedent had involved his being struck on the head by falling lumber (925a-926a). Dr. DiMaio testified that his findings on autopsy were compatible with the decedent being struck on his head by falling lumber.

Dr. DiMaio further testified that if, as claimed by the plaintiff, the decedent had been standing on the main deck leaning against the coaming and was struck by a swinging automobile and toppled over the coaming to the deck below, he would expect to find evidence of further injuries

to the decedent's back and chest. There were no such injuries found on autopsy, and the autopsy findings were thus incompatible with the version of the accident being proffered by the plaintiff (929a-935a). Indeed, on cross-examination by plaintiff's attorney, Dr. DiMaio only emphasized that if the accident had occurred in the fashion claimed by plaintiff, then there would have been evidence of other injury on the decedent's body, but there was none (946a-947a).

The admissions of Andre coupled with the autopsy findings of Dr. DiMaio afforded ample basis for a finding that the accident occurred without any fault whatever on the part of I.T.O. With the accident happening as Andre admitted, there would be no basis for awarding the Shipowner any recovery from I.T.O. Accordingly, when the Trial Judge made findings of fact that the *sole* cause of the accident was the dropping of the lumber by Andre, such findings effectively disposed of the Shipowner's claim against I.T.O. Such findings were based upon ample evidence and are therefore not "clearly erroneous" and may not be set aside.

The Shipowner has already had its opportunity to establish its claim that the accident was caused by reason of some negligence on the part of I.T.O.'s winch operator or other employees. The Court below, as a stipulated trier of the facts, did not accept the Shipowner's proof in that regard, but rather found the accident to have happened as Andre admitted and as the autopsy findings corroborated. Accordingly, regardless of the disposition that may be made on the plaintiff's appeal against the Shipowner, the Shipowner's cross appeal against I.T.O. should be denied as it has already had its day in Court on those issues and the findings of fact thereon are not even contended by the Shipowner to be "clearly erroneous."

The case upon which Shipowner seems to rely, *Caputo* v. *U.S. Lines Company,* 311 F. 2d 413, does not call for any different result. As this Court stated in that case the point that was there considered "crucial" was the fact that "the issue of the existence of a latent defect" which would exonerate the Stevedore had not been submitted to the jury in connection with the plaintiff's case. The situation is different in the instant case where the manner of the accident based upon the admission of Andre and the testimony of Dr. DiMaio were submitted to the jury on the plaintiff's case and undoubtedly formed the basis of the defendant's verdict rendered by the jury. Whatever error of law may have been committed by the Court as between the plaintiff and the Shipowner, and we do not mean to indicate that there was any such error, would not effect the fundamental findings of fact made by the Court herein regarding the happening of this accident which are amply supported by proof. This case did indeed present factual issues for resolution; and in that posture it is open for reasonable men to find differently. At the moment the jury's verdict is fully consistent with the Court's subsequent fact findings. If the plaintiff be entitled to a new trial against the Shipowner, which we do not believe to be the case, that in and of itself presents no reason for disturbing the amply supported findings of fact made by the Court and the dismissal of the indemnity action against I.T.O. by reason thereof.

CONCLUSION

The defendant Shipowner has had full opportunity to litigate its claim that the accident was in some way caused by a breach of warranty on the part of the third party defendant, I.T.O. The Trial Judge to whom that issue was reserved, however, found that the *sole* cause of the accident was the act of a carpenter named Andre in the employ of New Jersey Export Marine Carpenters. Those findings by the Trial Judge are amply supported by proof herein.

Accordingly, regardless of what disposition this Court may make of the plaintiff's appeal, there is no merit to the defendant's cross appeal. The judgment dismissing the defendant's indemnity action against I.T.O. is based upon factual findings supported by evidence and must, therefore, be affirmed regardless of what disposition may be made on the plaintiff's appeal.

Respectfully submitted,

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party
Defendant-Cross-Appellee
801 Second Avenue
New York, New York 10017
(212) 889-0410

SIDNEY A. SCHWARTZ,
JOSEPH ARTHUR COHEN,
Of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PAUL KLEIN, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to the within action. That on the 3rd day of December, 1974, he served a true copy of the annexed Brief

on

Paul A. Gritz, Esq.
185 Montague St.
Brooklyn, N.Y.

attorney for plaintiff; and

Haight Gardner Poor & Havens, Esqs.
1 State Street Plaza
New York, New York

attorneys for defendant and third party plaintiff

herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Paul Klein
PAUL KLEIN

Sworn to before me this
3rd day of December, 1974.

Albert V. Testa
Notary Public

ALBERT V. TESTA
NOTARY PUBLIC, State of New York
No. 31-9308300 Qual. in N. Y. Co.
Commission Expires March 30, 1976

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